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Before the  
**FEDERAL COMMUNICATIONS COMMISSION** APR 15 2005  
 Washington, D.C. 20554

Federal Communications Commission  
 Office of Secretary

In the Matter of: )  
 )  
 Request for Expedited Declaratory )  
 Ruling Concerning the Territorial ) MB Docket No. 04-75  
 Exclusivity Rule, Section 73.658(b) )  
 of the Commissions Rules )  
 )

**CONSOLIDATED REPLY OF DESTINY COMMUNICATIONS, LLC**  
**TO COMMENTS OF SUNBELT COMMUNICATIONS COMPANY AND NBC**  
**UNIVERSAL, INC.**

Destiny Communications, LLC ("Destiny"), the new licensee of television broadcast station KTGF, Great Falls, Montana, by its attorneys, hereby replies to both the Response of Sunbelt Communications Company to Comments of Destiny Licenses, LLC, and the Consolidated Opposition to Motion to Accept Comments and to Comments of Destiny Licenses, LLC in Support of Petition for Expedited Declaratory Ruling filed by NBC Universal, Inc. ("NBC") in the above-referenced proceeding.

Destiny's Comments on the *Request for Expedited Declaratory Ruling* ("Request") were responsive to the Commission's Public Notice released on March 19, 2004 inviting comments from the "public."<sup>1</sup> Even if the Commission had limited the comments to a

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<sup>1</sup> "Comment Sought on 'Request for Expedited Declaratory Ruling' Concerning the Territorial Exclusivity Rule (Section 73.658(b) of the Commission's Rules)," Public Notice, DA 04-747 (released March 19, 2004).

class of “interested parties,” which it has not, Destiny qualifies as a party in interest with standing to participate in this proceeding.<sup>2</sup>

As explained in Destiny’s Motion to Accept Late-Filed Comments, Destiny did not acquire an interest in station KTGF, Great Falls, Montana, until November 24, 2004. Following the closing on KTGF, Destiny began to pursue the renewal of the NBC affiliation agreement that was assigned by NBC to Destiny as part of the acquisition. Only when it became abundantly clear to Destiny that NBC would not even consider the renewal of the affiliation because of a pre-existing arrangement with a television broadcasting station in another community – the subject of this proceeding – did Destiny find it necessary to participate in this proceeding.

The record is now replete with attempts by both Sunbelt Communications Company (“Sunbelt”) and NBC to deflect attention from the actual purpose of this proceeding, which is to seek a declaratory ruling on the network territorial exclusivity rule based on the facts set forth in the 1999 letter from NBC to Sunbelt. Both Sunbelt and NBC, in a surprising

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<sup>2</sup> The Commission has long recognized the status of in-market competitors as giving rise to party in interest status. *See, e.g.,* In re Application of Shareholders of the Ackerley Group, Inc. and Clear Channel Communications, Inc. For Transfer of Control of the Ackerley Group, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 10828, fn. 2, (2002), citing *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). While the Commission does not have a well-established policy for determining parties-in-interest in a Declaratory Ruling proceeding, it has such a policy for determining that status in proceedings involving Petitions to Deny under Section 309(d) of the Communications Act of 1934, and Destiny clearly meets the standard set forth under that policy. Specifically, the Commission has determined that “a petitioner must, as a threshold matter, submit specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].” In re Application of The Curators of the University of Missouri, *Memorandum Opinion and Order and Notice of Apparent Liability*, 16 FCC Rcd 1174, para. 4 (2001), citing 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, the Commission has previously accorded standing as a party in interest to those who might suffer a potential direct substantial injury or adverse effect from the administrative action under consideration. *Office of Communication of the United Church of Christ v. FCC*, 124 U.S. App. D.C. 328, 359 F.2d 994, 7 RR 2d 2001, 2006 (D.C. Cir. 1966). Historically this encompassed those persons who might suffer economic injury or electrical interference. *Id.* at 2007.

departure from the parties' duty of candor, have sought to sabotage this proceeding by attempting to create a distracting side-issue -- the appearance of a factual dispute. It is quite telling that the record does not reflect any submissions from NBC or Sunbelt with objective evidence, such as previous or subsequent written correspondence between the Sunbelt and NBC regarding the 1999 letter and the arrangement described therein.<sup>3</sup>

It is apparent that Max Media did not set out to prove the facts described in the 1999 letter in this proceeding. Max Media sought to remove uncertainty regarding Section 73.658(b) as it applied to the facts described in the 1999 Letter – a different objective from proving the facts necessary to establish a rule violation. Under these circumstances, there is no reason why the Commission cannot clarify the meaning of the network territorial exclusivity rule to remove uncertainty. There are no material facts in dispute. Both the authenticity of the 1999 letter and the letter's content are undisputed. That letter describes an arrangement between Sunbelt and NBC. One of the terms of that arrangement was the termination of KTGF's network affiliation agreement with NBC. Under that arrangement, Sunbelt was to receive expanded network territory for its Helena station.

Simply put, the question before the Commission is one of rule interpretation. Given the facts described in the 1999 letter, that the owner of KTVH, Helena, Montana had a "contract, arrangement, or understanding, express or implied" with NBC (a "network organization"), which expands KTVH's network territory to include Great Falls, Montana, and "prevents or hinders" KTGF ("another broadcast station located in a different community") from

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<sup>3</sup> Letter from John F. Damiano, then Senior Vice President for Affiliate Relations at NBC, to James E. Rogers, President of Sunbelt, dated April 26, 1999 ("Letter").

renewing its NBC affiliation (“broadcasting any program of the network organization”), is there a violation of Section 73.658(b) of the Commission’s rules?<sup>4</sup>

Sunbelt’s Response demonstrates the need for the declaratory ruling. Sunbelt argues without authority that Section 73.658(b) “is intended to ensure that the public has access to network service . . . and the Commission is not interested in which network affiliate provides that service.”<sup>5</sup> This interpretation is completely at odds with the plain wording of the rule. The only authority cited by Sunbelt, *Letter to Eugene F. Mullin*, is unrelated to the facts in the 1999 Letter.

There are many uncertainties in the current rule in need of resolution as applied to the facts described in the 1999 Letter. Is termination of a station’s network affiliation sufficient evidence to prove that an arrangement has prevented or hindered the broadcasting of any program of the network? Is a rule violation avoided if NBC merely affiliates with a low power television station licensed to the Great Falls community, *i.e.*, does the rule apply to full service television stations only?<sup>6</sup> When a complaining station offers objective, documentary evidence of an arrangement between a station and network, which indicates a network’s decision to terminate the complaining station’s network affiliation, what would constitute sufficient evidence to rebut a finding of a violation of the network territorial exclusivity rule? Is the issue then limited to proving or disproving the existence of the contract, arrangement, or understanding? Does a network’s allegation of independent business judgment have any relevance in the absence of

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<sup>4</sup> See Application for Commission Consent to the Assignment of License for KTGF, BALCT-20040901AAF, granted on October 22, 2004 (FCC Public Notice Report No. 45849, released October 27, 2004).

<sup>5</sup> Sunbelt Response at page 5.

<sup>6</sup> The staff has held that the rule does not prohibit a network from choosing a different affiliate licensed to the same community. 10 FCC Rcd 4416 (MMB 1995). However, that case involved full service television stations licensed to the same community.

objective evidence proving that fact, *e.g.*, poor affiliate performance, market studies indicating undesirable conditions for continued network presence?<sup>7</sup>

Destiny believes the rule has been violated based on the facts described in the 1999 letter. Destiny believes the evidence adduced by Max Media should be sufficient to meet the burden of proof, unless rebutted by sufficient objective evidence that a contract, understanding, or arrangement did not exist. There are no case precedents directly on point. All other precedents involving this rule are based on materially different facts.

The requested declaratory ruling is in the public interest because further harm can be avoided if the requested ruling is made before the expiration of KTGF's current affiliation before July 1, 2005. Declaratory relief would serve the public interest and would facilitate negotiations between Destiny and NBC on a level playing field that enables NBC to consider the compelling economics of continuing the affiliation with KTGF under its new minority ownership structure. An expeditious declaratory ruling would open the door for Destiny to negotiate for the renewal of KTGF's affiliation with NBC without interference from the legacy of an illegal arrangement between the network and a large group owner of stations in a neighboring market.

Destiny deserves the opportunity to continue KTGF's network service to the Great Falls community. Sunbelt should not be permitted to supplant KTGF's relationship with NBC by virtue of an illegal "confidential" arrangement in violation of Section 73.658(b) of the

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<sup>7</sup> Beyond the record of this proceeding, Destiny cannot find any objective, rational business explanation for NBC's decision not to renew KTGF's affiliation. Destiny reviewed the business records of KTGF during the course of its due diligence prior to consummation of the purchase. As stated in the Declaration of Darnell Washington, attached to Destiny's Comments, there was no "notice of default or other communication from NBC that would indicate any deficiency in performance by KTGF(TV) as an NBC network affiliate." The only allegation of default surfaced in FCC filings after February 25, 2004, the date when Max Media informed the Commission of the illegal arrangement involving the NBC affiliation in Great Falls.

Commission's rules. Unless the Commission grants the relief requested by Max Media, a new minority owner of a local television station will be disadvantaged in the market; competition will be thwarted; and the community of Great Falls will lose the benefits of the strong local service now provided by KTGF.

Accordingly, Destiny respectfully requests that the Commission (a) act on the Request before the current term of KTGF's affiliation agreement expires on July 1, 2005, and (b) issue a declaratory ruling that the arrangement as described in the 1999 Letter, if subsequently proven, violates Section 73.658(b) of the Commission's rules.

Respectfully submitted,

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Dated: April 15, 2005

## CERTIFICATE OF SERVICE

I, Anne Rutherford, do hereby certify that on this 15th day of April, 2005, a copy of the foregoing "Consolidated Reply of Destiny Communications, LLC to Comments of Sunbelt Communications Company and NBC Universal, Inc." was served by first class United States mail, postage prepaid, addressed to:

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